No. 83-458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at 1a-44a)[1] is reported at 698 F.2d 1239. The opinion of the district court (Pet. App. at 53a-67a) is unreported.

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[1]References to Pet. App. are to the Petitioners' Appendices submitted to this Court.

JURISDICTION

The judgment of the court of appeals (Pet. App. at 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983. (Pet. App. at 50a). On July 8, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. On October 13, 1983, the Clerk of this Court extended the time for filing an opposition to and including November 4, 1983. The jurisdiction of this Court is claimed under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*, are set forth in Pet. App. at 69a-95a.

STATEMENT

A. The Agricultural Marketing Agreement Act

This case concerns the right of consumers of fluid milk to challenge regulations issued under the Agricultural Marketing Agreement Act ("the AMAA" or "the Act"), 7 U.S.C. § 601 *et seq.*, that erect trade barriers to commercially manufactured reconstituted fluid milk products.[2] These regulations deprive respondents of a lower priced al-

[2]Although similar to reconstituted milk products made at home by consumers using nonfat dry milk, commerically reconstituted milk products are organoleptically superior because they more closely approximate the taste and consistency of fresh fluid milk. 45 Fed. Reg. 75,960 (1980). Despite its close resemblance to fresh fluid milk, commercially reconstituted milk cannot be passed off to consumers as fresh fluid milk because of Federal and State labeling requirements. 45 Fed. Reg. 75,961-75,962 (1980).

ternative to locally produced fresh fluid milk. The regulations also deprive them of the benefits of commercially reconstituted milk's stabilizing effect on milk prices and supplies. (Pet. App. at 5a).[3] In each of the milk market areas where respondents reside, the challenged regulations drive the cost of reconstituted milk products higher than local fresh fluid milk by imposing a tax, called a compensatory payment, on any milk handler who manufactures and markets reconstituted milk.[4] (Pet. App. at 3a-4a). As a result, handlers simply do not manufacture and market reconstituted milk products in the market areas where respondents reside, or in the other market areas covered by the regulations at issue.

The AMAA was enacted in response to the severe economic conditions of the Depression. Concerned about the decline in the purchasing power of farmers, Congress authorized the Secretary of Agriculture to regulate the marketing of agricultural commodities so that farmers (producers) would receive a "fair return to the labor and capital involved in producing [agricultural commodities]." H.R. Rep. No. 6, 73d Cong., 1st Sess. 2-3, 7 (1933). Farmers were to be the primary beneficiaries of the Act, but Congress made it clear that the benefit to the farmer was not to be at the unfair expense of the consumer. As a result, "the bill embodies numerous provisions for the protection of consumers" from excessive prices. H.R. Rep. No. 6, *supra* at 6.

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[3]In the absence of the challenged regulations, handlers could store the dried ingredients, and when fresh milk supplies decline, reconstituted products could be manufactured to meet demands. This would, in turn, help stabilize milk prices, which generally increase during the winter months when production is lower. (C.A. App. at 46-47).

[4]45 Fed. Reg. 75,957 (1980).

The challenged regulations are not expressly authorized by the AMAA, but instead were issued pursuant to incidental rulemaking authority vested in the Secretary. Such authority may be exercised only when consistent with and necessary to effectuate the other provisions of the Act. 7 U.S.C. § 608c(7)(D). The Secretary claims that the regulation of milk handlers who manufacture reconstituted milk from milk powder is necessary to effectuate the explicit price fixing provisions of the Act.[5] *See* 34 Fed. Reg. 16,883 (1969).

The Secretary's rulemaking authority under the AMAA is carefully limited. In section 602, 7 U.S.C. § 602, Congress spelled out five specific policy objectives, and in section 608, prohibited the Secretary from issuing any market orders that do not effectuate these policies. 7 U.S.C. § 608c(4). Two of these five policy objectives express the congressional goal to protect the interests of consumers. The first protects against unduly high prices, 7 U.S.C. § 602(2), and the second protects against unreasonable fluctuations in supplies and prices. 7 U.S.C. § 602(4).[6] Section 608c(5)(G) further limits the Secretary's authority

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[5]These explicit price fixing provisions relate to the price handlers pay producers for raw milk. The Act expressly authorizes the Secretary to issue regulations to assure that milk handlers pay a uniform price to milk producers for milk based on the way the handler uses the milk. 7 U.S.C. § 608c(5). The regulations must also assure that milk producers receive a uniform or "blend" price from handlers regardless of how their milk is used. *Id.*

[6]Section 602 reads in pertinent part as follows:

"It is declared to be the policy of Congress –

. . .

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a

(continued)

by prohibiting the Secretary from issuing milk market orders that prohibit, or in any manner limit, the marketing in that area of a milk product produced anywhere in the United States. 7 U.S.C. 608c(5)(G).

Under the current regulations,[7] a handler who purchases milk powder from outside the order area and manufactures it into a reconstituted fluid milk product must report this fact to the order area administrator. (Pet. App. at 4a). This reconstituted milk product is then regulated not as a milk product, but as though it were fresh milk coming into the order area from an unregulated area. (Pet. App. at 4a). It is automatically "down-allocated," that is, it is

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(continued)

rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

. . .

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctations in supplies and prices.

. . .

7 U.S.C. § 602(2) and (4).

[7] Until 19 years ago, reconstituted milk products were not regulated under the milk market orders. This changed in 1963 and 1964 when the Secretary issued regulations governing reconstituted milk products. 28 Fed. Reg. 11,456, 11,848, 12,000 (1963); 29 Fed. Reg. 9002, 9110, 9214 (1964). In 1969, the Secretary expanded the regulations to cover reconstituted "filled" milk. 34 Fed. Reg. 16,548, 16,881 (1969).

assumed that the handler used it for the lower value, or Class II uses.[8] If the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk products, the handler is required to make a compensatory payment on the remainder. (Pet. App. at 4a-5a).

The compensatory payment is equal to the difference between the Class I and Class II prices. It is made to a producer settlement fund for distribution, not to the producers of the milk from which the milk powder is made, but to the local producers who supply the fresh milk in the particular order area where the handler is located. (Pet. App. at 5a).[9]

B. The Administrative Process

On August 23, 1979, respondents, together with a nonprofit consumer organization, Consumer Nutrition Institute ("CNI"), and a milk handler, Joseph Oberweis, petitioned the Secretary of Agriculture to rescind the regulations requiring handlers who manufacture reconstituted milk to make a compensatory payment to local milk producers.

Respondents contended that when added to the costs of milk powder, transportation, warehousing, and process-

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[8]Under all the market orders, handlers pay the highest "Class I" price for raw Grade A milk used for fluid consumption. Raw grade A milk purchased by the handler and used for other fluid products such as cream or condensed milk and for solid milk products is priced at a lower "Class II" rate. (Some orders divide the lower-value uses into Class II and Class III rates. For purposes of simplicity, this discussion assumes a single lower-value classification.)

[9]Similar regulations also apply to and effectively prohibit the manufacture of reconstituted milk products from powder produced within the order area. *See* n. 7, *supra*.

ing, the compensatory payment drives the cost of the reconstituted milk product so high that it cannot compete with fresh fluid milk.

Respondents asserted that elimination of the compensatory payment could save consumers on average 18.8 cents per gallon of fluid product.[10] Respondents further pointed out that the availability of reconstituted milk products would help prevent fluctuations in milk supplies and price increases during winter months when fresh milk production declines. Respondents cited studies showing that removing the restrictions on reconstituted products would not undermine the AMAA's objective of assuring stable market conditions for milk producers. In light of this information, respondents claimed that the existing regulations exceed the Secretary's authority to issue only regulations necessary to effectuate the objectives of the Act. Respondents' petition to the Secretary also charged that the regulations were arbitrary, capricious, were not substantiated by the information of record before the Secretary, and that the regulations violated the provisions of the AMAA prohibiting economic trade barriers on milk and milk products. (C.A. App. at 41-49).

C. The Decisions Below

After waiting 19 months for the Secretary to act on their petition, on December 2, 1980, respondents filed this suit seeking judicial review of the regulations and the Secretary's failure to act on their petition. On April 7, 1981, the

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[10]The Secretary has done his own study on cost-savings since respondents submitted their petition. The Secretary's study projected that within three years consumers will save $186 million annually in fluid milk expenditures if the challenged regulations are repealed. 45 Fed. Reg. 75,971 (1980).

Secretary denied respondents' petition. On September 29, 1981, the district court granted the Secretary's (petitioner herein) motion to dismiss on the grounds that the individual consumer respondents and CNI lacked standing, and that handler Oberweis had failed to exhaust his administrative remedies.

The court of appeals affirmed the dismissal of the handler and organizational plaintiffs, but reversed the district court concerning the three individual consumer plaintiffs.[11] Judge Wilkey, joined by Judge Tamm, exhaustively reviewed the constitutional requirements and prudential considerations for standing adopted by this Court and held that the individual consumers had standing to challenge the actions of the Secretary. Specifically, the court of appeals found that respondents had sufficiently alleged injury in fact, had presented a redressable claim, were within the zone of interest created by the AMAA and were not precluded from seeking review.

REASONS FOR DENYING THE PETITION

Petitioners present two rationales justifying the granting of a writ of certiorari. First they claim the decision below is in direct conflict with the decision of the Ninth Circuit in *Rasmussen v. Hardin,* 461 F.2d 595 (9th Cir.), *cert. denied,* 409 U.S. 933 (1972).

The court of appeals explicitly held that consumer standing is not precluded by the AMAA. (Pet. App. at 26a-27a, n. 75). *Rasmussen,* a 13-year-old case which held that consumer standing is precluded, has not been relied upon in the Ninth Circuit or other circuits. Moreover, since *Rasmussen,* the Ninth Circuit's enunciated preclusion of

[11]The organizational and handler plaintiffs have not filed a petition for writ of certiorari.

review standards have been consistent with this Court's decision in *Barlow v. Collins*, 397 U.S. 159 (1970) and the decisions of the D.C. Circuit, followed by the court below. Therefore, any conflict between the circuits on the basis of *Rasmussen* is speculative at best.

The petitioners' second reason for justifying the grant of a writ of certiorari is that even if all consumers are not precluded from seeking review, these plaintiffs have not satisfied the requisite constitutional and prudential requirements for standing. The court of appeals reviewed all relevant case law and found all of the elements of standing satisfied by the allegations of respondents. The government has failed to demonstrate that the decision of the court of appeals is in conflict with or even inconsistent with the holdings of this Court or other courts. Therefore, there is no reason to justify review by this Court.

1. The court of appeals rejected petitioners' argument and the reasoning of *Rasmussen* that Congress had impliedly precluded consumers from challenging milk market orders because it had explicitly established judicial review procedures for handlers and not for consumers. Judge Wilkey and Judge Tamm held that the inference drawn from Congress providing review procedures only for handlers "does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, . . . especially since no legislative history or statutory language is cited." (Pet. App. at 26a-27a, n. 75).[12]

[12]It is important to note that the dissent of Judge Scalia, relied upon heavily by petitioners, did not even mention petitioners' preclusion argument. Instead, Judge Scalia's one reference to *Rasmussen* was in the context of a discussion of the weight to be given the general policy section of 602(2) of the AMAA as establishing an interest of consumers. (Pet. App. at 40a).

Where, as in this case, the relevant statute does not expressly prohibit review, the party asserting nonreviewability has "the heavy burden of overcoming the strong presumption" in favor of review. *Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975).[13] Moreover, it was recognized by this Court in *Barlow v. Collins, supra,* that preclusion could be "implied only upon a showing of 'clear and convincing evidence' of a contrary legislative intent that the courts should restrict access to judicial review." 397 U.S. at 167, *quoting Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

Rasmussen, decided within months of *Barlow,* was perhaps a hasty reaction to *Barlow* and cannot be seen to conflict with the D.C. Circuit's well reasoned opinion in this case, which reflects 13 years consideration of the implied preclusion holding contained in *Barlow.* Petitioners' reliance upon *Rasmussen* is also unpersuasive since it is a decision of flawed reasoning, and petitioners cannot show any case that has followed or was based upon its reason-

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[13]An examination of just one of the cases relied upon by petitioners demonstrates how far short they fall in meeting their burden. In Morris v. Gressette, 432 U.S. 491 (1977), this Court found that review was "necessarily precluded" in order to fulfill the congressional intent to provide an expeditious method of implementing valid state voting rights legislation. *Id.* at 505. Permitting review would "unavoidably extend" a process which Congress had expressly intended to be expedited. *Id.* at 504-05. In stark contrast to *Morris,* preclusion of review by consumers is not necessary to effectuate any provision of the AMAA. That the interests of consumers may conflict with those of producers or handlers will not impair legitimate actions of the Secretary to benefit those latter groups. Any regulation will remain in effect pending a consumer challenge, and will be abrogated only upon a showing that the Secretary has acted outside the scope of his authority. Such a result can hardly be said to impair the proper functioning of the Act.

ing.[14] The Ninth Circuit's present view of the standards for preclusion of judicial review is consistent with *Barlow v. Collins.* Under these standards, it is unlikely that the Ninth Circuit, if faced with the issue today, would follow the result in *Rasmussen.*[15]

Since *Rasmussen,* the Ninth Circuit has held that "judicial review will not be cut off unless clear and convincing evidence discloses that Congress had both considered and prohibited review of the agency action in question." *Kitchens v. Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms,* 535 F.2d 1197, 1199 (9th Cir. 1976). In another case interpreting the implied preclusion guidance of *Barlow* the Ninth Circuit has stated:

> The jurisdictional "question [should be] phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (*Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, . . . HEW has the burden of establishing by " 'clear and convincing evidence' " that Congress, in enacting section 1316, "clearly command[ed]" that review be prohibited. (*Barlow v. Collins* (1970) 397 U.S. 159, 167, . . .).

County of Alameda v. Weinberger, 520 F.2d 344, 348 (9th Cir. 1975).

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[14]Defendant's reliance upon Suntex Dairy v. Bergland, 591 F.2d 1063 (5th Cir. 1979), to support their preclusion argument is misplaced. *Suntex Dairy* did not have before it the issue of consumer standing and rejected *Rasmussen's* reasoning that nonhandlers were precluded from seeking judicial review. *Id.* at 1066-67.

[15]Indeed it is noteworthy that *Rasmussen* was decided by only two Judges, due to the death of one panel member while the matter was *sub judice.*

Petitioners fail in their burden to justify preclusion, because if consumers are precluded, then it would reasonable follow that producers, who also are not mentioned in the judicial review provisions of the Act, would also be precluded. This Court and other courts, however, have consistently recognized the standing of producers and others to challenge market orders. These courts have repeatedly considered and rejected *Rasmussen's* reasoning that nonhandlers are precluded review because the AMAA provides a remedy only to handlers, and such review must be sought first from the Secretary. *Stark v. Wickard,* 321 U.S. 288 (1944); *Suntex Dairy, supra; Consolidated-Tomoka Land Co. v. Butz,* 498 F.2d 1208 (5th Cir. 1974).[16]

The *Rasmussen* court did look at *Stark v. Wickard, supra,* but distinguished it on the basis that this Court limited its holding only to situations where funds belonging to producers were improperly diverted to others. *Rasmussen, supra* at 600. While the plaintiffs in *Stark* were producers who had a proprietary interest in the fund, neither this Court's holding nor the subsequent cases have been so limited. In *Suntex Dairy v. Bergland, supra,* a case heavily relied upon by petitioners, the court in fact ex-

[16]Under the AMAA, market orders may only be issued after a rulemaking proceeding, including a hearing, 7 U.S.C. § 608c(3) and (4), and may only become effective if approved by two-thirds of the producers in areas covered by the order, 7 U.S.C. § 608c(8). Once a market order is imposed, only handlers are expressly given an opportunity to seek administrative and then judicial review. 7 U.S.C. § 608c(15). Handlers must first exhaust their administrative remedies before seeking judicial review under 7 U.S.C. § 608c(15). If producers or consumers object to an issued order, there is no administrative remedy to exhaust and no judicial remedy expressly provided in the AMAA. Consequently, consumers and producers may seek review of such order directly in district court under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

pressly rejected the argument that producers have standing only with respect to specific procedural or other express rights in the Act. Instead, the *Suntex* court allowed the producers to launch a broad challenge to the regulation as not being supported by substantial evidence. *Id.* at 1067. *See also* n. 18, *infra.*

Equally invalid is petitioners' argument that permitting review by consumers would enable a handler to avoid exhaustion of administrative remedies requirements by aligning himself with a consumer to bring suit in district court. No such circumvention has been found to occur by permitting producers to have direct access to the courts, and circumvention in such cases would be much more likely to occur since many handlers are also producers. *See e.g., Dairylea Cooperative, Inc. v. Butz,* 504 F.2d 80, 82 (2nd Cir. 1974) (Dairylea Cooperative, an association of dairy producers which also acted as a milk handler, was allowed to seek review without exhausting any administrative remedy.). Moreover, this argument overlooks the fact that it is to the handler's advantage to first pursue his remedy before the Secretary. Not only may he be able to avoid altogether a costly and time-consuming court proceeding, but he may not be subject to any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary. 7 U.S.C. § 608c(14). By initiating the administrative review process, a handler may simple continue his current practices until and unless the Secretary affirms the challenged regulation.

Finally, the petitioners and the respondent-intervenor milk producers point to the delicate balance of the agricultural market system, which extends beyond milk to fruits, vegetables, tobacco, and other products. They express concern about the "potential for considerable mischief," if judicial review is available to consumers, who, unlike handlers, need not exhaust administrative remedies.

(Pet. at 16-18). Petitioners, invoking this Court's decision in *United States v. Ruzicka*, 329 U.S. 287 (1946), urge that absent initial resort to the Secretary, congressional interest in an orderly market system would be frustrated if consumers could challenge market orders.[17]

This seems overly reactive given the discretion provided to the Secretary under the express and incidental rule-making authority of the AMAA. The market orders of the Secretary should be easily defended if they are within the scope of his authority and supported by an adequate rule-making record. The decision of the court of appeals is not going to open the floodgates of litigation, as anticipated by petitioners, providing that the Secretary has not exceeded his authority under law.[18]

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[17]Petitioners' reliance on *Ruzicka* is misplaced. *Ruzicka*, a case dealing solely with the rights of handlers, explicitly acknowledged that under *Stark v. Wickard*, producers may seek judicial review of market orders irrespective of the administrative process that handlers must exhaust. 397 U.S. at 1295. In *Ruzicka*, this Court also recognized congressional interest in requiring handlers to challenge particular market orders in a timely fashion and not wait to raise those challenges in enforcement proceedings. That case required handlers to use and exhaust the remedies provided to them by Congress. The concerns expressed in *Ruzicka* for an orderly system do not extend to situations where consumers or producers, who are not provided administrative remedies and whose challenges will not disrupt enforcement proceedings, seek judicial review of a milk market order.

[18]Producers, importers and unregulated handlers have been judicially recognized to have standing to challenge marketing orders, with no apparent resulting burdensome litigation. *Stark v. Wickard, supra;* Walter Holm & Company v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (tomato importers have standing to challenge market regulation although they are not domestic handlers directly governed by the order); Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137, 1140 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1970) (unregulated handler of tomatoes has standing to challenge marketing orders and regulations although it is only "indirectly affected.").

This argument has been raised before to this Court when producers were granted standing to challenge market orders issued under the AMAA. This Court's statement about that issue in relation to producers, applies equally to consumers:

> It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly unauthorized by a valid act. United States v. Rock Royal Co-op., 307 U.S. 533, . . . Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case.

Stark v. Wickard, supra, 321 U.S. at 310.

Therefore, consumers are not as a class precluded from seeking review of AMAA market orders under the Administrative Procedure Act. 5 U.S.C. § 551 *et seq.*

2. The court of appeals did not err in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. An examination of how the court of appeals considered the constitutional and prudential issues of standing will demonstrate that it meticulously followed the decisions of this Court. Petitioners' complaint is more that the court of appeals did not decide ultimate issues of merit rather than with the standards applied or conclusions made in this case.

The court of appeals first analyzed the three elements of standing imposed by Article III of the Constitution. The court found "injury in fact" in that the consumers had alleged a definable and discernible injury. (Pet. App. at 13a). First, the court found sufficient respondents' allegation that as a result of the Secretary's order, "they are precluded from purchasing a 'nutritious dairy beverage at a lower price than fresh drinking milk.' " The court of appeals also found adequate the allegation that "they [consumers] are deprived 'of a stabilizing market influence,' since '[a] reconstituted fluid product could quickly expand the fluid milk supply when [seasonal] changes result in a reduction of the whole fluid milk supply.' " (Pet. App. at 13a).

The second and third constitutional elements of standing were carefully distinguished by the court and found to have been satisfied by respondents. Judge Wilkey's opinion held that the "fairly traceable causation" element and the "redressability" element, though related, were not necessarily interchangeable. (Pet. App. at 9a).

The court stated that "[t]he fairly traceable causation inquiry is directed toward the connection between the alleged injury and the defendant's actions." (Pet. at 16a). The court found this causation on the basis of allegations of the consumers that if handlers were not required to make a compensatory payment, they would pass the savings on to consumers. The court found this to be a reasonable assertion and, for the purposes of determining standing, did not find it necessary to take its inquiry further. (Pet. App. at 16a). Petitioners assert that several different market factors may negate the passing on of reduced prices to consumers. Judge Wilkey, however, stated, "If standing depended upon a plaintiff's ability to allege uncontro-

verted facts, there would be very few plaintiffs who could establish standing in a lawsuit of any complexity." *Id.*[19]

Concerning the last element of constitutional standing, the court stated that in contrast to causation, "[t]he redressability inquiry . . . focuses on the connection between the injury and the *action requested of the court.*" (Pet. App. at 9a) (emphasis in original). While the district court had rejected consumers' reliance on a Department of Agriculture Impact Statement that predicts, if the compensatory payment requirement were eliminated, consumers nationwide would save $186 million annually within three years, the court of appeals found the impact statement sufficient to support consumers' allegations. The court of appeals stated:

> The district court found this showing inadequate because the same USDA statement relied upon by Consumers estimated that elimination of the compensatory payment requirement would cost milk *producers* $576 million. The [district] court observed that this drop in producer earnings "*might* interfere with the public's access to an adequate supply of milk and *might* result in higher prices for milk products." The court concluded that since the structure of the dairy industry is so complex, "any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative." We conclude that the district court required too much of Consumers.

(Pet. App. at 18a) (emphasis in original).

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[19]The court of appeals also noted that respondents had, in fact, done much more than simply allege a causal link. Respondents had proffered evidence that supported their allegations. (Pet. App. at 61a, n. 44)

The court of appeals found it reasonable to conclude that the judicially ordered elimination of the compensatory payment required to be made by handlers could result in reduced prices being passed on to consumers. The court concluded that respondents had in fact satisfied the constitutionally required elements of standing.

The court of appeals then analyzed the prudentially required elements of standing and held that the respondents were within the zone of interests of the AMAA and that the grievance complained by respondents was not generalized. Judge Wilkey followed his recent opinion in *Tax Analysts and Advocates v. Blumenthal,* 566 F.2d 130 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978), in finding, on the basis of the congressional goals contained in sections 602(2) and 602(4) of the AMAA, that respondents were within the zone of interest of the AMAA to challenge the Secretary's action under section 608c.

Judge Wilkey noted that *Tax Analysts* stood for the proposition that the zone of interests test was of a generous nature and that "a plaintiff was only required to assert an interest 'which *is arguable from the face of the statute.*' " (Pet. App. at 22a *quoting Tax Analysts* at 142) (emphasis in original). Since section 608c(4) requires the Secretary to review milk marketing orders in relation to how they "will tend to effectuate the declared policy of this chapter," the purposes of the Act are identified with the section being enforced. The court of appeals went on to say:

> The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and*

> *consumers,* an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices.*" Since Consumers allege that the challenged portion of the milk market orders prohibit the sale of reconstituted milk, resulting in higher milk prices and seasonable shortages, they [consumer plaintiffs] have asserted an interest which is at least "arguably" within the zone of protected interests.

Pet. App. at 22a-23a (emphasis in original) (footnotes omitted).

Petitioners argue that the consumer plaintiffs are not within the "zone of interest" of the AMAA because their interest in a lower cost alternative to fluid milk is directly antithetical to the interests of producers, the primary beneficiaries of the AMAA. (Pet. at 2). An examination of the decisions of this Court enunciating and applying the zone test reveals that petitioners' argument has no merit. Those cases have granted standing to parties whose interests were directly opposed to the interests of the primary beneficiary of the relevant statute. *Arnold Tours, Inc. v. Camp,* 400 U.S. 45 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1969).

Congress did not give the Secretary of Agriculture a free rein to take any action which might be in the interest of producers. To the contrary, "the text and legislative history of this statute make it plain that the Secretary was required to operate within the narrow confines of powers expressly granted." *Fairmont Foods Co. v. Hardin,* 442 F.2d 762, 766 (D.C. Cir. 1971).

The result urged by petitioners would create the unusual and unintended situation of leaving only producers and

handlers as the guardians for aggrieved consumers when the Secretary acts outside the narrow confines of the Act and violates the statutory policies protecting consumers. In enacting the AMAA, Congress sought to provide dairy farmers a fair return on their investment adequate to assure a stable supply of milk. At the same time, 7 U.S.C. § 602(2) reflects congressional concern that consumers not bear the brunt of any regulation that maintains producer prices higher than necessary to accomplish this purpose. By asserting that the existing regulations are unnecessary to adequately protect farmers and that the regulations harm consumers, respondents bring themselves squarely within the statute's zone of interest. *See Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11, 19 (D.C. Cir. 1979) (one of the principal statutory policies of the AMAA is "to protect the health and purses of consumers").

The court of appeals carefully considered the issues raised by petitioners and decided only that *these* consumers indeed had standing to challenge *these* milk market orders. Petitioners do not claim conflict with other circuits or even the application of incorrect standards. They argue only that the court of appeals should have gone further. The court below, for purposes of standing, decided not to decide these issues on the merits, and that decision should not be disturbed.